

# VIGILANTISM REVISITED: AN ECONOMIC ANALYSIS OF THE LAW OF EXTRA-JUDICIAL SELF-HELP OR WHY CAN'T DICK SHOOT HENRY FOR STEALING JANE'S TRUCK?

KELLY D. HINE<sup>\*</sup>

## TABLE OF CONTENTS

Introduction .....	1222
I. Vigilantism Revisited .....	1223
A. A Definition .....	1223
B. Historical Background .....	1225
C. Legal Treatment of Vigilantism .....	1226
II. An Economic Analysis of the Law of Extra-Judicial Self-Help .....	1228
A. The Economic Analysis of Criminal Behavior .....	1228
1. History .....	1228
2. The model .....	1229
B. Criminal Justice and the Collusive Duopoly .....	1233
1. The criminal justice industry .....	1233
2. The collusive duopoly .....	1234
3. The criminal justice industry: Act II .....	1236
4. A brief compendium .....	1237
III. Why Can't Dick Shoot Henry for Stealing Jane's Truck? .....	1237
A. Why Does Vigilantism Occur? .....	1238

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<sup>\*</sup> Law Clerk to the Honorable A. Joe Fish, United States District Judge, Northern District of Texas; J.D., *magna cum laude*, Southern Methodist University, 1997; B.S., Southern Methodist University, 1993; author, Comment, *The Rule of Law is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and the Debate Over Judicial Discretion*, 50 SMU L. REV. 1769 (1997). I would like to thank former Southern Methodist University and current University of Texas at Dallas Assistant Professor of Economics, Michael Davis. Professor Davis introduced me to the economic analysis of law as an undergraduate. His course prompted me to re-examine my understanding of our legal institutions and rekindled my interest in law as a profession. For this I am grateful. I would also like to thank Angela Wennihan for her insightful comments on earlier drafts.

1. Relaxing the assumptions of the model.....	1238
a. The costless collection of sanctions.....	1238
b. Returns to scale.....	1239
c. Identical cost assumptions .....	1240
2. The absence of established law enforcement.....	1242
3. Exogenous changes in the costs and benefits of crime .....	1244
a. Exogenous increases in the damage from criminal conduct.....	1244
b. Exogenous increases in the personal costs and benefits from crime .....	1246
B. Why Does the Law Prohibit Certain "Vigilante" Activities While Allowing Others? .....	1248
1. Protection of governmental interests.....	1248
2. Violence and social cost.....	1248
a. Imminence and perception .....	1249
b. The hangman's noose: excessive violence and vigilantism .....	1250
Conclusion .....	1252
Appendix .....	1254

## INTRODUCTION

In a small town in Texas, citizens band together to confront and harass drug dealers, ultimately driving the dealers from their neighborhood. The local police praise the community for organizing "a legalized vigilante movement."<sup>1</sup> In Oakland, California, housing complex residents use threats of civil law suits to prompt building owners to evict criminals. The residents' leader describes the process as "cheap, safe and fast justice."<sup>2</sup> In Dallas, Texas, a group of mall security guards whip four youths with belts and canes after the youths admit to stealing from a mall store.<sup>3</sup> A grand jury refuses to indict the guards for their actions.<sup>4</sup> In each case, citizens chose to supplement established legal norms by administering their own brand of criminal justice. In each instance, many in the community applauded the "vigilante" action.

Then why would the legal system treat these situations so differently—praising the two former but bringing judicial process to bear in the latter? The mantra "violence is bad" is surely too simplistic;

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1. See Eric Garcia, *Terrell Residents Take Aim Against Area Drug Dealers: Crime Prevention Program Modeled After Taylor Effort*, DALLAS MORNING NEWS, Aug. 7, 1995, at 11A.

2. See Linda Jones, *Neighbors Unite to Evict Crime*, DALLAS MORNING NEWS, Mar. 9, 1995, at 1C.

3. See Steve Scott & Todd Bensman, *Nation of Islam Members Not Indicted in Beatings: Youths' Mom Angry; Others Cheer Move*, DALLAS MORNING NEWS, June 28, 1995, at 1A.

4. See *id.* (indicating that grand jury "was swayed by public sentiment that the guards were justified in disciplining the boys").

our criminal justice system regularly countenances the use of force to maintain and encourage legal compliance.<sup>5</sup> Moreover, the law does not limit this express approval to governmental actors. Within strictly specified bounds, private citizens may use force to protect themselves,<sup>6</sup> their property,<sup>7</sup> and others<sup>8</sup> from unlawful intrusion. American society does not merely tolerate violent self-help, it promotes it as necessary and beneficial conduct.<sup>9</sup>

Why does vigilantism occur? Why does the law prohibit certain "vigilante" activities while allowing others? Does the current level of prohibition make sense? This essay utilizes a social wealth maximization model in an attempt to answer these questions and to rationalize the apparent disparity between vigilantism and legally justified self-help. Part I addresses the definition and historical roots of vigilantism, Part II develops a framework for analyzing extra-judicial self-help, and Part III applies this framework to the questions at hand.

## I. VIGILANTISM REVISITED

### A. A Definition

To most, vigilantism is a rather amorphous concept. Ask nine different people to describe a "vigilante" and you will likely receive ten different answers.<sup>10</sup> Detractors have branded groups as diverse as anti-abortionists,<sup>11</sup> state militias,<sup>12</sup> opponents of disfavored politi-

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5. See, e.g., CAL. PENAL CODE § 190 (West 1988) (allowing option of death penalty for first degree murder); GA. CODE ANN. § 16-5-1 (1996) (giving state option of seeking death penalty for murder); TEX. PENAL CODE ANN. § 12.31 (West 1994) (permitting state to seek death penalty for capital felony).

6. See MODEL PENAL CODE § 3.04 (1985) (stating that the "use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself").

7. See *id.* § 3.06 (asserting that using force is permissible when "immediately necessary" to protect property).

8. See *id.* § 3.05 (explaining that using force to protect others is justifiable under certain circumstances).

9. See Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 879 (1984) (noting that American society generally accepts self-defensive conduct). But see RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5-6 (1991) (claiming link between American acceptance of violent self-defense and increased tolerance of societal violence and high murder rate).

10. In this regard, one commentator described vigilantism as "all things to all men." WILLIAM E. BURROWS, *VIGILANTE!* at xi (1976).

11. See President Bill Clinton's Remarks on Signing the Freedom of Access to Clinic Entrances Act of 1994, 1 PUB. PAPERS 989, 990 (May 26, 1994) ("No person seeking medical care . . . should have to endure harassments or threats . . . from vigilantes . . .").

12. See David Jackson, *Militias Meet Enemy Head-On; Senators Get Earful of Anti-Fed Rhetoric*, THE PHOENIX GAZETTE, June 16, 1995, at 1A (quoting law enforcement officials describing militias as "'dangerous' and 'disturbing' bands of vigilantes").

cians,<sup>13</sup> countries imposing trade sanctions,<sup>14</sup> heckled basketball players,<sup>15</sup> and the politically correct<sup>16</sup> as "vigilantes." If true vigilantism encompassed this wide spectrum of actions, the task of defining it would be Herculean indeed. Fortunately, it does not.

Although the press and popular culture abound with vigilante references, the scope of true vigilantism is rather narrow. Webster's Ninth New Collegiate Dictionary defines a "vigilante" as "a member of a volunteer committee organized to suppress and punish crime summarily (as when the processes of law appear inadequate)."<sup>17</sup> Under this definition, labeling several of the preceding examples as "vigilantes" is obviously wrong.<sup>18</sup> But a dictionary definition, though helpful and good for an initial grasp, is somewhat inexact for academic use.

William E. Burrows provides a more complete definition of vigilantism in his seminal work on the subject. According to Professor Burrows, classic vigilantes (1) are members of an organized committee; (2) are established members of the community; (3) proceed for a finite time and with definite goals; (4) claim to act as a last resort because of a failure of the established law enforcement system; and (5) claim to work for the preservation and betterment of the existing system.<sup>19</sup> Under Professor Burrows' definition the anti-abortionists and

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13. See Jill Zuckman, *Packwood Resigns Senate; Sees a "Duty" in Face of Call for Expulsion*, BOSTON GLOBE, Sept. 8, 1995, at 1 (stating the opinion of one senator that the Senate Select Committee on Ethics used vigilante justice).

14. See Jim Landers, *Europe Siding with Japan in Dispute on Auto Tariffs*, DALLAS MORNING NEWS, June 19, 1995, at 1D (describing nations that use sanctions to punish others as "trade vigilantes").

15. See David Moore, *Defiant Rockets Still Have Swagger*, DALLAS MORNING NEWS, Apr. 27, 1995, at 1B (calling Houston Rockets' guard, Vernon Maxwell, who ran into the stands after a fan, a vigilante).

16. See George F. Will, *Chief Illiniwek and the Sensitivity Cavalry*, WASH. POST, Mar. 9, 1995, at A21 (describing those groups that found University of Illinois Indian Mascot offensive as "thought vigilantes").

17. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1315 (1983).

18. For example, Vernon Maxwell was neither a member of an organized committee, nor was he overly concerned with an inability of the established legal system to prevent crime when he entered the stands and vented his frustrations on a particularly opinionated fan. See Moore, *supra* note 15. Likewise, the Senate Ethics Committee, composed of paid governmental representatives, was bound by Senate rules and the dictates of due process in its handling of the Packwood case.

19. See BURROWS, *supra* note 10, at 13-14. Professor Burrows has further limited his examination to only those vigilantes employing violence or threats of violence. See *id.* at xiii. Burrows claimed that without violence, vigilantes would be impotent and incapable of enforcing their agenda:

[V]iolence or the threat of it lies at the very heart of the matter. Violence . . . has given vigilantes their social bite . . . . Without violence in some form, actual or potential, vigilante action would mean next to nothing, because it would be incapable of intimidation and, therefore, of "regulation."

*Id.* While I adopt the remainder of Burrows' definition, I reject this limitation. Professor Burrows' statement directly conflicts with his own account of a personal brush with non-violent

militiamen do not qualify as true vigilantes—the anti-abortionists failing because of their desire to alter the existing system, the militias failing because of their perpetual nature.<sup>20</sup> At least one other legal scholar has adopted this definition of vigilantism;<sup>21</sup> this Article will do likewise.

### B. *Historical Background*

American vigilantism<sup>22</sup> has passed through three distinct incarnations over the last two hundred years: Classical vigilantism, neovigilantism, and pseudo-vigilantism.<sup>23</sup> Classical vigilantism, the earliest stage, originated during the late colonial or early federal period and concerned itself primarily with policing various miscreants on the expanding western frontier.<sup>24</sup> Neovigilantism was an urban phenomenon originating in San Francisco in the mid-1850s. Unlike classical vigilantes, who were concerned with protecting home and hearth from marauders, neovigilantes often targeted religious and ethnic minorities for persecution.<sup>25</sup> Pseudo-vigilantism surfaced following the dramatic increases in crime and the tremendous social

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regulation related only three pages earlier. *See id.* at x (recalling a vigilante's act that did not include violence). I contend that non-violent vigilantism (i.e., non-violent extra-judicial self-help) is in fact possible. *See, e.g., supra* notes 1-2 and accompanying text (offering examples of non-violent action done in the interest of justice being condoned as forms of "legalized vigilantism").

20. Professor Burrows also denies vigilante classification to the Ku Klux Klan, the Black Panthers, and others based on each respective group's failure to meet one or more of his criteria. *See BURROWS, supra* note 10, at 14-15.

21. *See* Brandon et al., *supra* note 9, at 891. Unlike this Article, however, Brandon accepted Burrows' violence limitation on the definition of vigilante action. *See id.* (affirming violent behavior as a requisite characteristic of "vigilante" action); BURROWS, *supra* note 10, at 13-14 (indicating that vigilantes are only effective if they are capable of intimidating others).

22. Vigilantism is not a uniquely American phenomenon. Although historically vigilantism has experienced its greatest acceptance in the United States, examples of vigilante activity can be found worldwide. *See, e.g.,* Barry Hillenbrand, *Afterlife of Violence: The Cease-Fire May Have Halted the Killings, But the Hard Men Are Still Preying on Their Communities*, TIME, June 12, 1995, at 58 (describing I.R.A. and Loyalist "punishment beatings" in Northern Ireland as method to enforce order); Malachi O'Doherty, *Vigilantes Threat to NI Peace*, NEW STATESMAN & SOC'Y, June 2, 1995, at 7 (discussing "punishment beatings" inflicted by Loyalist and Republican paramilitaries in Northern Ireland on those considered criminals); Christopher Walker, *Settlers Blockade Frontier Crossing*, TIMES (LONDON), Oct. 2, 1995, at 12 (reporting that West Bank Jews were setting up vigilante force in anticipation of Israeli troop withdrawal); *see also* BURROWS, *supra* note 10, at 15-16.

23. *See* BURROWS, *supra* note 10, at 15-16.

24. *See id.* at 16 (characterizing classic vigilantism). For an interesting account of classical vigilantism as related by a former vigilante, *see* NATHANIEL PITT LANGFORD, VIGILANTE DAYS AND WAYS; THE PIONEERS OF THE ROCKIES; THE MAKERS AND MAKING OF MONTANA, IDAHO, OREGON, WASHINGTON AND WYOMING (1912).

25. *See* BURROWS, *supra* note 10, at 16 (describing how classic vigilantes concerned themselves with punishing "ordinary badmen—horse and cattle thieves, counterfeiters, and assorted gangs of desperadoes," while neovigilantes targeted ethnic and religious minorities and political opponents).

upheavals experienced in the 1960s.<sup>26</sup> This most recent manifestation of vigilantism appears to combine traits of both its predecessors.<sup>27</sup>

To this framework, this Article adds an additional category: faux-vigilantism. Faux-vigilantes<sup>28</sup> are those individuals characterized by their detractors, the media, or themselves as vigilantes, but who fail to satisfy the definition of true vigilantes set out above. Lynch mobs, rioters, disturbed subway commuters,<sup>29</sup> and numerous others<sup>30</sup> populate this category. These individuals are not true vigilantes and their actions fall beyond the scope of this essay.

### C. Legal Treatment of Vigilantism

[The people] are where the law comes from, you see. For they chose the delegates who made the Constitution that provided for the courts . . . . And so when your ordinary citizen sees [the justice system fail] he must take justice back into his own hands where it was once at the beginning of all things. Call this primitive, if you will. But so far from being a *defiance* of the law, it is an *assertion* of it—the fundamental assertion of self-governing men, upon whom our whole social fabric is based.<sup>31</sup>

This passage from *The Virginian* provides the quintessential reasoning used by vigilantes to explain their actions—the law comes from the people, therefore it is the people's right and duty to enforce the law. Vigilantes see this right as a form of self-preservation flowing

26. See *id.*

27. See *id.* (describing potentially volatile combination of classic vigilantism and neovigilantism).

28. The term is the author's.

29. Bernhard Goetz, the "Subway Vigilante," was not in fact a vigilante. As Professor Brown has pointed out:

[T]here is no tradition of individual vigilantism in this country, and Goetz was no vigilante. Rightly or wrongly, he acted in what he (and the jury before which he was eventually tried) viewed as self-defense. The historical tradition in which Goetz fit was not vigilantism but that of no duty to retreat.

BROWN, *supra* note 9, at 134 (citations omitted). The case of the California jogger convicted on weapons violations in relation to the shooting death of two "taggers" (graffiti artists) also falls within the category of non-vigilante self-defense. See Sharon Bernstein, *Tagger's Killer Convicted of 2 Gun Violations*, L.A. TIMES, Oct. 3, 1995, at B3.

30. See, e.g., *supra* notes 11-16 and accompanying text (citing examples of vigilante-type behavior by abortion protesters, anti-government militias, a Senate committee, and professional athletes); Elisabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 146-47 (1995) (characterizing battered women who strike back against their abusers as vigilantes). Ms. Ayyildiz erroneously equates retaliatory spousal killing with vigilantism. Similar to the Bernard Goetz "Battered Citizen's Syndrome," Battered Spouse Syndrome is more properly classified under the "no duty to retreat" tradition. Cf. BROWN, *supra* note 9, at 134 (discussing the difference between vigilantism and "no duty to retreat").

31. OWEN WISTER, *THE VIRGINIAN* 435-36 (1902).

naturally from the ideals of popular sovereignty.<sup>32</sup> Perhaps, this duty relies on the concept of "Manifest Destiny" as applied to the vigilante's desire to maintain social order.<sup>33</sup> The vigilante sees his actions as necessary and therefore justified.

Opponents of vigilantism invariably cite the paradoxical nature of vigilante action as a reason to question vigilantes' sincerity and social value: how can one violate the law in the name of law and order?<sup>34</sup> The answer to this paradox lies in one's view of the nature of law itself. Positivists, those who believe the law is whatever the legislature and courts say it is,<sup>35</sup> find this paradox irreconcilable and view the vigilante as more repugnant than the criminal he apprehends.<sup>36</sup> But for those who view the law as able to encompass either more or less than the courts or the legislature specifically designate as criminal,<sup>37</sup> the vigilante paradox is less troublesome. For them, because the "right" to commit the original crime is not a protected legal interest, action by a vigilante in violation of that "right" is not criminal.<sup>38</sup>

No state currently recognizes a "Justified Vigilantism" or "Community Protection" defense to criminal prosecution.<sup>39</sup> As a result, the established legal system treats vigilantes no differently than other citizens. If the legislature criminalizes the underlying conduct and the accused is unable to raise a "protection,"<sup>40</sup> "law enforce-

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32. See BURROWS, *supra* note 10, at 278 (stating that Americans feel they have an inalienable right to safeguard their interests).

33. Cf. Gary Hoppenstand, *Justified Bloodshed: Robert Montgomery Bird's "Nick of the Woods" and the Origins of the Vigilante Hero in American Literature and Culture*, 15 J. AM. CULTURE 51, 55 (1992) (discussing how the idea of "Manifest Destiny" was used to justify violent acts against Native-Americans).

34. See Brandon, *supra* note 9, at 891 (recognizing contradiction between vigilantes' goals and their methods).

35. See George P. Fletcher, *A Transaction Theory of Crime?*, 85 COLUM. L. REV. 921, 921 (1985) (comparing the pre-positivist theory, claiming the legislature speaks because an act constitutes a crime, and the positivist theory, asserting that "conduct is criminal because the legislature speaks").

36. See Brandon, *supra* note 9, at 891 (maintaining "vigilantism aggravates the social ills that crime inflicts upon society").

37. Professor Fletcher has characterized such individuals under the broad rubric of "pre-positivists." See Fletcher, *supra* note 35, at 921. Vigilantes' tendency to justify their actions as necessary to protect innate rights is reminiscent of quasi-"natural law" ideology. Although exploring the ramifications of reliance on such an ideology would no doubt prove a stimulating academic exercise, this Article will go no further than to mention it as a possibility.

38. See *id.* (inferring that because crime is "an assault on a protected legal interest" the crime itself is not protected (citing H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 6 (3d ed. 1978))).

39. The lack of a defense is not surprising given the established legal system's antipathy toward vigilantism. See, e.g., ALASKA STAT. § 12.62.005 (Michie 1996) (indicating legislature's purpose in enacting the Code of Criminal Procedure as being, in part, to avoid vigilantism).

40. See *supra* notes 6-8 and accompanying text (describing situations where individuals may use force to defend against unlawful intrusion).

ment,"<sup>41</sup> or other statutorily recognized defense, then the vigilante conduct is not tolerated in the eyes of the law.

Whether a district attorney or United States Attorney can convert this lack of legal defense into a criminal conviction is an entirely different matter. On occasion, grand and petite juries will "no bill" or acquit despite the law, if the actions of the accused appear to fall within reasonable community standards.<sup>42</sup> The old refrain, "no jury would ever convict me," still appears to ring true.

As a result, the law of extra-judicial self-help is effectively split between the "no justified vigilantism" stance of the courts and the "justified if reasonable" stance of the community. The following sections look more closely at the vigilante reaction in an attempt to rationalize this disparity.

## II. AN ECONOMIC ANALYSIS OF THE LAW OF EXTRA-JUDICIAL SELF-HELP

### A. *The Economic Analysis of Criminal Behavior*

#### 1. *History*

The economic analysis of criminal law traces its roots to the utilitarian ideals found in the writings of Cesare Beccaria and Jeremy Bentham.<sup>43</sup> In the late eighteenth and early nineteenth centuries, these commentators justified criminal punishment as necessary to "[defend] the repository of the public well-being from the usurpation of individuals."<sup>44</sup> Both men recommended reworking criminal law to promote, in the words of Beccaria, "the greatest happiness shared among the greater number."<sup>45</sup> Although the idea of a communal purpose in the law predates even Bentham,<sup>46</sup> he is generally credited as the first to employ the "utility" nomenclature.<sup>47</sup>

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41. See MODEL PENAL CODE § 3.03 (1985) (justifying conduct exercised in furtherance of public duty).

42. See, e.g., Scott & Bensman, *supra* note 3 and accompanying text (noting grand jury acquittal of security guards charged with beating burglary suspects).

43. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 2, 33 (1981); Cesare Beccaria, *On Crimes and Punishments*, in BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed. & Richard Davies trans., 1995); *infra* note 47 (describing Bentham's role in law and economics theory).

44. Beccaria, *supra* note 43, at 10.

45. *Id.* at 7.

46. See Thomas Aquinas, *Summa Theologica*, in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS 744-45 (Anton C. Pegis ed., Hackett Publ'g Co. 1997) (1945) (scribing that "law is always directed to the common good").

47. See DOUGLAS G. LONG, *BENTHAM ON LIBERTY: JEREMY BENTHAM'S IDEA OF LIBERTY IN RELATION TO HIS UTILITARIANISM* 100-01 (1977); POSNER, *supra* note 43, at 2 (explaining that



Legal scholarship largely ignored these concepts for roughly two centuries. But in the late 1950's, Gary Becker, an economist at the University of Chicago, began expanding his economic studies to areas traditionally considered the exclusive domain of the law.<sup>48</sup> The early writings of Guido Calabresi and Ronald Coase blurred the line even further.<sup>49</sup> This trend culminated with the recognition of an entirely new "species" of legal theory—economic analysis—in Richard A. Posner's *Economic Analysis of Law* published in 1973.<sup>50</sup>

In the years following, economic analysis has earned a place as a tool for the examination of our legal system.<sup>51</sup> Critics have charged that the genre combines the worst elements of its precursors and thus presents an amoral and myopic world view which disregards other explanatory tools.<sup>52</sup> This criticism has some merit. But as one critic has pointed out, perhaps the only alternative to this myopia is total blindness, and given the choice, some enlightenment is preferred to none at all.<sup>53</sup>

## 2. *The model*

In the view of the established criminal justice system, vigilantes are no different from other actors in society.<sup>54</sup> Therefore, vigilante activity, when considered criminal, is subject to the same constraints faced by other criminal activities.

One of the basic assumptions of economics is that people behave in what they perceive to be their own best interest. Individuals are

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Bentham was among the first to apply economics to crime and punishment).

48. See POSNER, *supra* note 43, at 2-3 (stating that Becker used economics in areas such as education, fertility, and the behavior of criminals and prosecutors).

49. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 21-22 (4th ed. 1992) (explaining how Calabresi and Coase expanded the scope of economic analysis from antitrust law to more traditional legal fields such as torts, property, and contracts).

50. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1st ed. 1973). Although "economic analysis" or "social wealth maximization" theory shares much the same pedigree and many of the analytical tools as utilitarianism, they are not the same. In a 1979 article, Posner highlighted the differences between economic analysis and the utilitarian and Kantian traditions from which it arose. See generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104, 111-35 (1979) (stressing that utilitarian theory judges action by promoted "happiness," whereas wealth maximization theory looks at the promoted "welfare").

51. This explosion of economic analysis is due in no small part to the prolific writings of the movement's founders.

52. See Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 228-29 (1980) (criticizing Posner's wealth maximization principle as an unsound ideal which cannot be defended); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing and denouncing Posner's *Economic Analysis of Law*).

53. See Leff, *supra* note 52, at 477 ("Tunnel vision . . . is the price we pay for avoiding total blindness.").

54. See *supra* notes 39-42 and accompanying text (describing types of vigilante conduct and possible defenses).

thought to act as "rational maximizers" of their ends in life.<sup>55</sup> The proposition that people will not act unless the benefit of the action outweighs its cost (i.e., unless to act would increase their personal satisfaction) naturally flows from this assumption. Although some might view the application of the "rational maximizer" analysis to the realm of criminal activity as somewhat tenuous, empirical studies suggest otherwise.<sup>56</sup> Thus, as it applies to criminal activities, this proposition means that an individual citizen will not purposely break the law unless that citizen's expected personal gain from the crime<sup>57</sup> outweighs the citizen's expected personal loss from the criminal activity.<sup>58</sup>

For the legal system to effectively perform its deterrent function,<sup>59</sup>

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55. See POSNER, *supra* note 49, at 1 (laying the foundation for economic analysis and starting with the notion of man as a pursuer of his self-interest).

56. As Posner has observed:

A growing empirical literature on crime has shown that criminals respond to changes in opportunity costs, in the probability of apprehension, in the severity of punishment, and in other relevant variables as if they were indeed the rational calculators of the economic model—and this regardless of whether the crime is committed for pecuniary gain or out of passion, or by well educated or poorly educated people.

*Id.* at 223-24 (citation omitted); see also Isaac Ehrlich, *Participation in Illegitimate Activities: An Economic Analysis*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 68, 69 (Gary S. Becker & William M. Landes eds., 1974) (discussing how illegal behavior can be explained by the "costs and gains from legitimate and illegitimate pursuits"); Matti Viren, *A Test of an Economics of Crime Model*, 14 INT'L REV. L. & ECON. 363, 369 (1994) (concluding that crime is not unaffected by policy actions).

57. The expected personal gain from crime can be calculated as equal to the actual gain, if the criminal succeeds, multiplied by the probability of success. To illustrate, a thief, who believes his thievery will go undetected nine times out of ten and that a single successful theft will net him \$1000, would have an expected benefit from a single theft equal to \$900 ( $\$1000 \times 0.9$ ).

58. See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1235 (1985) (noting that although not all humans will make such an analysis, most criminals reflect upon the threat of sanctions). Similar to the expected gain, the expected personal loss from criminal activity is a function of the actual punishment imposed if the criminal fails times the probability of failure. Thus, an increase in either the level of punishment or the probability of receiving that punishment will lead to a higher expected loss and lower incidence of the criminal activity. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT*, *supra* note 56, at 10. The total expected loss also includes any pecuniary outlays. For example, such outlays would include the cost of tools or a gun, and non-pecuniary opportunity costs such as wages that could be earned through lawful work. See POSNER, *supra* note 49, at 223.

59. According to economic analysis, society should deter crime because criminal activities are socially costly and inefficient, thereby decreasing social wealth. As Posner explained:

The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the "market," explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange. Market bypassing in such situations is inefficient—in the sense in which economists equate efficiency with wealth maximization—no matter how much utility it may confer on the offender.

Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) (footnote omitted); see also Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as Preference-Shaping Policy*, 1990 DUKE L.J. 1, 8-9 (1990) (stating that criminal law is concerned with minimizing the negative externalities associated with criminal activity).

it must provide penalties for criminal acts and enforce those penalties with sufficient regularity to ensure that this balance favors legitimate activities over criminal ones.<sup>60</sup> This may seem self-evident,<sup>61</sup> but criminal penalties and criminal enforcement are not without their own social costs.<sup>62</sup> Over-enforcement may be more costly than the crime it deters.<sup>63</sup> The criminal justice system must balance these three considerations (net harm from the crime, cost of the sanction, and enforcement expenses) when determining what level of criminal activity to permit in society.<sup>64</sup>

If the criminal justice system could obtain perfect information, the optimal condition would set the actual punishment for deterrable actions infinitely high with the probability of enforcement set correspondingly low, but sufficient to deter the activity in question.<sup>65</sup> Because society would never punish desirable activity or waste resources punishing undeterrable activity, and because undesirable, deterrable activity would never occur,<sup>66</sup> these conditions would maximize social

60. See Shavell, *supra* note 58, at 1235-36 (positing that for society to confront and catch criminals it must maintain a reliable enforcement apparatus, which will be more expensive at its most efficacious level).

61. Indeed, like so many things academic, scholars recognized this relationship in principle years before it was quantified:

The greater the eventual evil, and the greater the chance of incurring it, the greater the efficacy of the command, and the greater the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken.

JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 16 (Isaiah Berlin et al. eds., Weidenfeld & Nicholson 1954) (1832).

62. Those apprehended and convicted of crimes experience disutility in the form of fines, prison sentences, and social stigma associated with punishment, which may not be offset by benefits to others. See POSNER, *supra* note 49, at 224-25 (explaining that in cases where a criminal would no more be deterred by a harsher sanction than a lighter sanction, imposition of the harsher sanction would have a greater cost—and provide no benefit—to society). The costs of maintaining police, prisons, and other law enforcement necessary to ensure apprehension and conviction are borne by society and increase in proportion to an increase in the probability of apprehension. See *id.* at 227-28.

63. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975) (explaining that the major problem with competitive private enforcement is overproduction). Thus, carried to its logical extreme, if law enforcement became more costly to society than the criminal activity, legalization of the criminal activity should follow. This, of course, is just another way of saying that society should change laws that do more harm than good; hardly a novel proposition.

64. See Becker, *supra* note 58, at 14 (stating that the criminal justice system should give "due weight to the damage from offenses, the cost of apprehending and convicting offenders and the social cost of punishment"); see also Shavell, *supra* note 58, at 1236 (theorizing that social welfare from crime equals expected benefit minus the sum of the expected harm, the cost of sanctions and enforcement expenses).

65. This is a simplified restatement of Professor Becker's conclusion in *Crime and Punishment*. See Becker, *supra* note 58, at 16.

66. This we know because the expected personal cost of engaging in the criminal activity is set higher than the expected benefits derived from crime. See *supra* notes 55-58 and accompanying text (explaining cost-benefit analysis of crime). Because no one would commit crimes, policing costs would be negligible (high enough only to maintain a sufficient probability of

wealth.<sup>67</sup>

In reality, the criminal justice system is far from perfect. The system makes mistakes, and many costs and benefits defy calculation. These imperfections create the potential for the punishment of socially desirable actions, for the failure of sanctions to deter some undesirable actions, and for the actual imposition of sanctions for criminal activity.<sup>68</sup>

Because of these imperfections, the actual level of punishment for crime is not irrelevant. Concerns for the disutility caused by punishment,<sup>69</sup> for the ability of the criminal to "pay" the sanction imposed, and for the effect of the sanction on marginal deterrence,<sup>70</sup> now provide incentives for smaller, finite sanctions.<sup>71</sup> Put simply, real world punishments must differ substantially from the "optimal."

In order to maintain deterrence, the system must couple these smaller sanctions with the likelihood of apprehension. But to increase enforcement, society must incur more costs in the form of po-

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apprehension to ensure deterrence), and because punishment would never occur, the social cost of punishment would be irrelevant. See Becker, *supra* note 58, at 16.

67. See Shavell, *supra* note 58, at 1242-43 (deducing that it only makes sense to impose hefty sanctions on "undesirable acts" that are readily deterrable).

68. See *id.* at 1243 (blaming these inherent inconsistencies on the inability of the legal system to collect "perfect information" about criminals and their crimes).

69. See *supra* note 62 (explaining disutility and citing examples of the disutility caused by punishment).

70. The concept of marginal deterrence embodies the incentives provided by graduating penalties in proportion to the severity of the crime. To illustrate, if rape and murder each carry the death penalty, there is no incentive for the rapist not to kill his victim and thereby remove a witness to the crime. But if rape is penalized less severely than murder, the rapist has an incentive to cut his potential losses, and allow the victim to live.

71. See Shavell, *supra* note 58, at 1245-46 (noting in the alternative that the lower the probability of apprehending a person, the higher the optimal sanction should be). Another factor affecting the calculus is the "marginal disutility of punishment." This concept accounts for the deterrent effect of an incremental change in sanction. If, for example, the marginal disutility of punishment decreases as the actual level of punishment increases, then each additional unit of punishment acts as less of a deterrent than the unit of punishment immediately preceding it. To illustrate, under a system exhibiting a decreasing marginal disutility of punishment, imposing one week of jail time for a previously unpunished activity provides more deterrence than increasing the jail time for an already criminalized activity from fifty-two to fifty-three weeks. It is not clear, however, whether our system of punishments is one where deterrent effect increases or decreases on the margin. Compare Becker, *supra* note 58, at 45 (noting lower elasticity of response to changes in punishment compared to changes in probability of incurring punishment for serious crimes), and Posner, *supra* note 59, at 1205 n.25 (discussing discounting problem of long prison sentences), with Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 481 (1975) (noting that "a positive time preference for freedom implies a negative time preference for imprisonment"), and John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 429-30 (1980) (arguing that diminishing marginal utility of money creates incongruity in the deterrent affect of large and small fines). This Article favors the view that the incremental disutility of punishment does decrease as actual punishment levels increase. If such is the case, this would provide yet another reason to prefer lower actual sanctions.

lice, prisons, and other enforcement costs before the trade-off between the costs of crime and the costs of crime prevention comes full circle.

To summarize, actors in society seek to maximize the benefits they receive from their actions. This means that a person will commit an act only if the expected benefit from that act exceeds the cost. Because some actions produce a net social detriment, society brands them as criminal and seeks to minimize their occurrence by employing criminal sanctions to increase the expected personal cost to the actor. But these sanctions, and the apparatus maintained to impose them, are not without social cost. The criminal justice system must, therefore, balance the social costs of enforcement with the social benefits of deterrence. Since the criminal justice system lacks perfect information, numerous concerns support setting the probability of incurring a criminal sanction higher, and for setting the actual sanction imposed lower than their theoretically optimal levels, given perfect information.<sup>72</sup> The next section explores how our criminal justice system determines the optimal level of sanctions and probabilities of enforcement.

### *B. Criminal Justice and the Collusive Duopoly*

#### *1. The criminal justice industry*

Although the established criminal justice system often views vigilantism as criminal, the vigilante sees his actions as merely providing an alternative private source of criminal justice.<sup>73</sup> The idea that society could supplement or replace the existing public law enforcement system with law enforcement supplied by private actors is hardly novel.<sup>74</sup> The question, then, is which system of criminal justice—public, private, or a hybrid of the two—could best manage the balancing of interests necessary for efficient law enforcement.

In a 1975 article, William M. Landes and Richard A. Posner presented an economic analysis of the law enforcement “industry.”<sup>75</sup>

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72. See *supra* notes 65-68 and accompanying text (recognizing that when exploring this subject, the imperfect nature of the courts' information and the individual characteristics of the actors must be considered and weighed accordingly).

73. See Brandon, *supra* note 9, at 891 (defining vigilantism as a paradox; despite the vigilante's objective of seeking justice, they violate the law in heinous ways while pursuing their brand of law and order).

74. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 5 (1974) (proposing that offenders convicted of crimes be punished by an amount related to the value of the damages caused to others, adjusted upwards for the probability that offenders avoid conviction).

75. Landes & Posner, *supra* note 63.

They began with Professor Becker's assertion that the impact of crime on social wealth is a function of the net social detriment of crime, the cost of criminal enforcement, and the cost of criminal sanctions.<sup>76</sup> Professors Landes and Posner went further and demonstrated that under strictly controlled circumstances,<sup>77</sup> optimal public law enforcement is more efficient than private enforcement.<sup>78</sup> According to their model, private enforcers must over-enforce (raise the probability of punishment given a sanction) to cover the costs incurred in apprehending and convicting criminals.<sup>79</sup> But because the optimal public enforcer does not face market constraints, the public enforcer may "price" criminal justice according to the true optimal balance between the probability of punishment and the actual sanction.<sup>80</sup>

Professors Landes and Posner, however, placed a very important caveat on their discussion by limiting their preference for public enforcement to the purely theoretical realm.<sup>81</sup>

## 2. *The collusive duopoly*

The leap from the purely theoretical to the (somewhat) practical requires, in Landes and Posner's words, "a theory of the behavior of public enterprises."<sup>82</sup> More exactly, it requires a theory of the behavior of the criminal justice "industry."

Professors Landes and Posner wrote their article in 1975, years before the first rumblings of the fall of communism. If this political sea change taught economists anything, it taught them that the forces of the market constrain even governmental actors. A market theory of behavior, that of the collusive duopoly, may provide the behavioral theory necessary to expand Landes and Posner's theoretical model

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76. *See id.* at 10.

77. The Professors limited their analysis with several assumptions: (1) costless penalty collection; (2) constant returns to scale; (3) identical costs of enforcement under public and private systems; (4) positive optimal number of criminal offenses; and (5) a system combining penalties and enforcement. *See id.* at 10-11.

78. *See id.* at 15.

79. *See id.* (explaining that greater resources need not be invested in crime prevention since a public enforcer can act as a "private profit maximizer").

80. *See id.*

81. Landes and Posner stated:

In showing that private enforcement is less efficient than optimum public enforcement, we have not established a case for preferring public to private enforcement. That would require a comparison between private and *actual*, not optimal, public enforcement, a comparison very difficult to make without a theory of the behavior of public enterprises.

*Id.* at 15-16 (emphasis added).

82. *Id.* at 16.

beyond its purely theoretical realm.<sup>83</sup>

A duopoly is a system in which two firms supply the entire market;<sup>84</sup> for example, a state criminal justice system and a federal criminal justice system.<sup>85</sup> A duopolistic system may take one of four forms depending on the relative sizes and activity levels of the two suppliers.<sup>86</sup> In a collusive duopoly, the suppliers act in concert.<sup>87</sup> By avoiding rivalry and staying within their own strictly specified spheres of operation, the duopolists can maximize total industry profits.<sup>88</sup> Because this collective control gives the collusive duopolists a monopoly within their market, cooperation maximizes their individual profits as well.<sup>89</sup>

Our established criminal justice system most closely resembles this "collusive" industrial form. With few notable exceptions,<sup>90</sup> state and federal prosecutors limit themselves to cases within their respective spheres. They do not compete to fill the demand for criminal justice. This cooperation mirrors the classic collusive duopoly and gives the established criminal justice system a monopoly on the supply of law enforcement.<sup>91</sup>

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83. Landes and Posner analyzed the relative benefits of a private monopolistic law enforcement system and even mentioned the existence of "a public monopoly." See *id.* at 16-20, 30-31. But they never expressly extended their analysis. This Article builds on the theory founded by these two great legal scholars. It extends their economic analysis to specifically examine why vigilantism occurs and to what extent it should be tolerated by society.

84. See K.C. KOGIKU, MICROECONOMIC MODELS 127 (1982).

85. As seen above, the idea that the criminal justice system performs as an "industry" or "market" is not entirely untenable: "[a] system of law enforcement is implicitly a market in legal claims." Landes & Posner, *supra* note 63, at 33.

86. Professor Kogiku defined these four forms as follows:

1. Cournot's Duopoly Model

Duopolist A is passive and duopolist B is passive, "passive" here meaning that the seller does not know the rival's reaction pattern and assumes the rival makes no change.

2. Stackelberg's Model of Asymmetric Duopoly

A is passive and B is active or A is active and B is passive, "active" here meaning that the seller knows the rival's reaction pattern.

3. Indeterminate Case

A is active and B is active.

4. Collusive Duopoly

A is collusive and B is collusive.

KOGIKU, *supra* note 84, at 127.

87. See *id.* at 132.

88. See *id.*

89. See *id.* at 132-33.

90. See, e.g., *United States v. Koon*, 34 F.3d 1416, 1438-39 (9th Cir. 1994) (allowing successive prosecutions in state and federal courts under "dual sovereignty doctrine"), *aff'd in part, rev'd in part on other grounds*, 518 U.S. 81 (1996).

91. As stated earlier, Professors Landes and Posner effectively came to the same conclusion, albeit without explanation, stating that "[w]ith few exceptions, there is a public monopoly—more precisely a series of public monopolies—of criminal law enforcement." Landes & Posner, *supra* note 63, at 30-31.

### 3. *The criminal justice industry: Act II*

Economists generally take a dim view of monopolistic systems. The restricted production and "deadweight loss" associated with monopolies cause them to appear less efficient when compared to competitive systems.<sup>92</sup> In the criminal justice context, however, this production restriction actually may lead to a more efficient industry.<sup>93</sup>

The major problem with competitive private law enforcement is overproduction.<sup>94</sup> The monopolist's natural proclivity to underproduce, however, partially mitigates this concern.<sup>95</sup> Lower production levels lead to a lower probability of enforcement (and hence, a lower cost of enforcement) at each corresponding level of criminal sanction.<sup>96</sup> This results in a lower total social cost of crime under a monopoly than under a competitive system.<sup>97</sup> The lower total social loss under monopoly signifies greater efficiency in the system, which translates to increased social wealth—the economist's "Holy Grail."

The public nature of the law enforcement duopoly further enhances efficiency. As Professors Landes and Posner have pointed out, the public chronically underfunds its law enforcement agencies.<sup>98</sup> Because these agencies lack funding, they are unable to produce as much law enforcement at each corresponding level of criminal sanction as they could otherwise.<sup>99</sup> The resulting system restricts output beyond even that level inherent in monopoly. The legislature's control of the purse strings theoretically enables it to reduce the production of criminal justice to mirror the optimal (i.e., the

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92. In a single supplier system, the monopolist may restrict production, thereby raising the price of the good in order to exact "monopoly rents." The uncompensated social loss incurred when this higher price causes the public to shift consumption from the monopolist's good to the next best substitute good is the "dead weight loss" associated with monopoly. *See* POSNER, *supra* note 49, at 277-81.

93. *See* Landes & Posner, *supra* note 63, at 31. This assertion, that reducing the level of enforcement and corresponding penalties actually decreases the total social loss from crime, at first, may seem counter-intuitive. But because the competitive enforcement system would overproduce law enforcement, the social benefit obtained from decreased enforcement outweighs the social loss from increased crime. *See id.* at 19-20.

94. *See supra* note 79 and accompanying text (citing Landes & Posner, *supra* note 63, at 15 (discussing need for private enforcement to over-enforce and therefore cover costs)).

95. *See* Landes & Posner, *supra* note 63, at 30 (noting that the social cost of a monopoly in terms of misallocation of resources is also a social benefit from an enforcement perspective since monopolies would seek to minimize enforcement production).

96. *See id.* at 19-20 (concluding that private competitive enforcement yields a greater social loss from crime than private monopolistic enforcement).

97. *See id.* (explaining that excessive enforcement yields a higher social loss).

98. *See id.* Underfunding in this context means funding at levels where the deterrent benefit gained from an additional "unit" of enforcement (marginal benefit) still outweighs the cost of the additional "unit" (marginal cost). *See id.* at 36-37.

99. *See id.* at 37 (analyzing the public enforcer's budget constraints and the various funding sources of private enforcement).



most efficient) public enforcer.<sup>100</sup>

#### 4. *A brief compendium*

Before moving to Part III, a summary of this subsection is helpful. Theoretically, efficiency considerations generally argue in favor of public law enforcement.<sup>101</sup> Private enforcers, unlike the theoretical optimal public enforcer, must internalize the costs of competition. These costs lead to over-enforcement which lowers the relative efficiency of the system.<sup>102</sup>

Extending this analysis to actual enforcement requires a theory explaining the behavior of our criminal justice industry. Our system of two suppliers, state and federal, working in tandem, most closely resembles the collusive duopoly. This cooperation gives the duopolists—the state and federal governments—an effective monopoly within the criminal justice market.

Although monopolistic systems usually perform less efficiently than competitive ones, a monopoly in criminal justice may actually be more efficient than competition.<sup>103</sup> The increase in efficiency comes as a result of the monopolist's characteristic output restrictions. These restrictions mitigate the overproduction problems associated with competitive enforcement and maximize social welfare by minimizing the total social loss from crime.<sup>104</sup>

Finally, public funding restrictions carry this benefit of monopoly one step further. Underfunding restricts production by reducing the system's ability to produce. By manipulating funding levels, the legislature may increase or decrease the intensity of law enforcement in the criminal justice industry. If done properly, this fine tuning may enable the system to mirror the results of the optimal public enforcer.<sup>105</sup>

### III. WHY CAN'T DICK SHOOT HENRY FOR STEALING JANE'S TRUCK?

The Introduction to this Article raised several questions regarding the nature of vigilantism and of society's reaction to it. The preceding discussion laid the groundwork to address these questions. Part I

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100. See *id.* (noting that appropriation of additional funds by the legislature could "maximiz[e] the expected value of enforcement").

101. See *supra* notes 84-91 and accompanying text (describing the criminal justice system as an industry concerned with functioning efficiently).

102. See *id.*

103. See *supra* notes 90-93 and accompanying text (explaining that "production restriction" resulting from a monopoly makes criminal justice industry efficient).

104. See *supra* notes 95-97 and accompanying text.

105. See *supra* notes 98-100 and accompanying text (describing how legislative control of funding can produce an efficient public enforcement system).

delimited the scope of true vigilantism by providing a brief historical overview and discussing the established system's treatment of the subject. Part II defined the economic model for examining public and private enforcement systems, set out the analytical assumptions regarding efficiency, and supplied the rationale used in analyzing the model. The discussion now turns to the reasons behind vigilantism and why the law prohibits it.

### A. *Why Does Vigilantism Occur?*

#### 1. *Relaxing the assumptions of the model*

As stated earlier, Professors Landes and Posner predicated their analysis of the criminal justice industry on several basic assumptions.<sup>106</sup> Perhaps a factual inaccuracy in one or more of these assumptions forms the roots of vigilantism. Relaxing some of those underlying assumptions and examining the probable impact on the system may reveal such inaccuracies.

##### a. *The costless collection of sanctions*

The first assumption is the easiest to modify. Professors Landes and Posner's model of economic efficiency assumed that all sanctions were fines and that the system incurred no costs in collecting them.<sup>107</sup> But in a system exclusively utilizing fines, the low actual probability of receiving a criminal sanction,<sup>108</sup> in many cases, would cause the corresponding optimal fine to exceed the criminal's ability to pay.<sup>109</sup> This solvency limitation forces the criminal justice system to employ non-pecuniary sanctions, such as imprisonment and probation in place of fines.<sup>110</sup> Unlike fines, which the criminal justice system may administer at minimal cost, non-pecuniary sanctions are notoriously expensive.<sup>111</sup> In essence, real world penalties cost money.

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106. See *supra* note 77 and accompanying text (setting forth Landes & Posner's five assumptions under which optimal public law enforcement is more efficient than private enforcement).

107. See Landes & Posner, *supra* note 63, at 10.

108. Professor Shavell cites statistics indicating that the actual probability of apprehension and conviction for larceny-theft may be as low as 2.47% and as low as 4.69% for auto theft. See Shavell, *supra* note 58, at 1239 n.26 (citing FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, 1981 UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 152 (1982)).

109. See *id.* at 1238 (indicating that probability of avoiding apprehension for criminal acts is a relevant factor in assessing inadequacy of monetary sanctions as deterrent to certain crimes).

110. See *id.* (explaining why monetary sanctions alone would not adequately deter crimes normally punished by imprisonment).

111. For example, the state must expend money to build and maintain prisons, pay the salaries of guards and probation officers, and care for and feed inmates. See POSNER, *supra* note 49, at 227 (recognizing that part of the social costs of imprisonment includes expenditure for prison construction, operation, and maintenance); see also Posner, *supra* note 59, at 1205 n.25 (noting that public enforcement of the law involves investments in prisons, police forces,

Internalizing fine collection expenses raises the social cost associated with criminal sanctions. Assuming accurate "pricing" of non-pecuniary sanctions, internalizing fine collections should not affect the deterrent value of sanctions.<sup>112</sup> But the increase in cost does alter the optimal balance between the sanction, the probability of sanction, and the damage from crime. The higher cost of sanctions raises the total cost of law enforcement to society at all levels. Because crime is now less costly relative to enforcement, the optimal level of crime allowed by society increases.<sup>113</sup>

But this apparent increase in the crime rate should not provide the impetus for vigilantism. The overall increase in crime merely reflects the internalization of the once external enforcement costs. The theoretical model may seem less efficient, but the actual underlying system remains unchanged.

*b. Returns to scale*

Similar to the internalization of enforcement costs, relaxing the assumption of constant returns to scale for the law enforcement industry affects the model only in form, not in substance. An alteration that changes the model from one of constant returns<sup>114</sup> to one of varying returns to scale<sup>115</sup> merely affects the observed relationship between the input of resources and the output of criminal law enforcement. Assuming that criminal justice is an economic commodity, varying returns with the scale of the industry should provide a more realistic model.<sup>116</sup>

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courts, and prosecutors' offices).

112. The probability and severity of the sanction required to provide optimal deterrence does not change as the cost of the sanction to the enforcer increases. The optimal deterrence level is determined by the benefit perpetrators receive from crime, not by the cost of enforcement to society. See POSNER, *supra* note 49, at 223 (remarking that persons commit crimes because expected benefits are greater than expected costs).

113. Stated graphically, the increased cost of sanctions causes the perception of an upward shift in the law enforcement demand curve—the locus of points at which the marginal benefit from a decrease in crime equals the marginal cost of increased law enforcement. See fig. 1, *infra* Appendix.

114. An industry is one of constant returns to scale when any increase in the amount of resources devoted to production creates a linearly proportional increase in output.

115. When an industry experiences varying returns to scale, at very low levels of resource investment, an increase in the amount of investment yields a disproportionately large benefit. See generally KOGIKU, *supra* note 84, at 40-41 fig. 2.2.1 (representing production function in terms of varying levels of factor inputs). At higher levels of resource investment, the proportional benefit of investing additional resources tapers off. See *id.* This is known as the *law of decreasing returns to scale*. See *id.* at 43.

116. See generally *id.* at 40-44 (describing optimum production output under assumed state of technology). A community obviously receives a greater benefit per officer from placing its first police officer on the beat than from placing its hundred and first. Cf. *id.* at 44 (stating that firms achieve the optimum "by minimizing total cost of production").

This variation translates to a preference for using changes in the amount of law enforcement to set deterrence, given low levels of enforcement, and for using changes in sanctions, given high levels of enforcement.<sup>117</sup> But because the point at which the law enforcement industry minimizes its total cost remains the same, these changes will not affect the optimal level of crime.<sup>118</sup>

The end result is similar to that achieved by the internalization of penalty costs, though even less dramatic. The change in form caused by allowing the fluctuation in industry returns affects neither the measured nor the actual level of crime present in society. Not only is there no change in substance, there is hardly a change in form. Because relaxing this assumption would not even provide the appearance of greater social costs, it could not provide the impetus for vigilante behavior.

*c. Identical cost assumptions*

Altering the model's assumption of identical costs for public and private law enforcement differs from internalizing the cost of sanctions or varying the returns to scale. Inherent differences in the manner and scope of public and private enforcement lead to dramatic differences in their cost structures.<sup>119</sup> Because of the different cost structures of public and private enforcement mechanisms, relaxing the same cost assumption has an impact on public and private enforcers in different ways and to varying degrees. These differing impacts may affect the model substantively rather than merely alter its

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117. A graphical representation would appear as an increase in the steepness of the lower portion of the social loss indifference curve and a decrease in the steepness of the upper portion. (The social loss indifference curve illustrates various combinations of sanctions and probabilities of incurring the sanctions that yield a constant social loss.) See Landes & Posner, *supra* note 63, at 12. Intuitively, this is because at lower levels of enforcement, taking resources away from sanctions and reallocating those resources to enforcement, raises the enforcement level by more than the sanction decreases. The result is a higher level of deterrence given the same cost of inputs or a lower cost of inputs given a desired level of deterrence. At higher levels of enforcement the analysis reverses, with society benefiting from a reallocation of resources away from enforcement and back toward sanctions.

118. The law enforcement industry balances enforcement and sanctions such that it minimizes its total social costs at the optimal deterrence level given the net social harm from crime. See *supra* Part II.B (describing collusive duopoly of public law enforcement system and efficiency considerations regarding public and private law enforcement). Holding all else equal, the expanded model would set the balance between enforcement and sanctions where disproportionate benefits from the reallocation of resources are no longer available, that is at the point where the law enforcement industry's resources are efficiently allocated. By definition, that point exists where the returns to scale are neither increasing nor decreasing—the point of constant returns to scale.

119. See *supra* notes 92-100 and accompanying text (describing inefficiencies of private law enforcement caused by overproduction, in contrast with efficiency of public law enforcement resulting from underproduction); *infra* notes 125-31 and accompanying text (explaining factors causing cost variations between public and private law enforcement mechanisms).

form.

Large, bureaucratic governmental law enforcement is expensive. The costs of creating and maintaining the necessary work force and infrastructure are staggering.<sup>120</sup> Private enforcers, such as vigilantes, enjoy a tremendous cost advantage over public enforcers in this respect. Vigilantes are not salaried, they do not require extensive training, and they generally keep capital expenditures to a minimum.<sup>121</sup> As members of the community victimized by crime, vigilantes also enjoy the benefits of increased familiarity with their victimizers.<sup>122</sup> This familiarity should make apprehension easier, thereby lowering the cost of enforcement.<sup>123</sup> Furthermore, vigilante law enforcement does not subject the criminal to the continuing level of stigma associated with a public criminal record.<sup>124</sup> Perhaps then, these substantial cost savings make vigilantism more cost efficient than public law enforcement.<sup>125</sup>

120. The federal government alone spent over \$15 billion on crime control in 1993 and estimated expenditures of \$21.5 billion in 1996. See BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996, H.R. DOC. NO. 104-003, at 64 tbl. 4-1 (1995) (providing itemized table of the budget spending amounts allocated to various law enforcement agencies).

121. Vigilantes, in fact, have pointed to cost as a justification for their actions. See generally BURROWS, *supra* note 10, at 18-19 (indicating that substantial expense required to maintain sufficient official law enforcement is a factor favoring the formation of vigilante committees). But some vigilantes have invested considerable time and effort in their cause. See, e.g., *id.* at 94-95 (describing how the San Francisco Committee of Vigilance of 1856 maintained fortified headquarters known as Fort Gunnybags).

122. For example, vigilantes are often eye witnesses or direct victims of the crime.

123. Cf. Landes & Posner, *supra* note 63, at 22 (noting that "victim enforcement eliminates the external diseconomies associated with the duplication of effort and costs when several enforcers pursue a single offender").

124. "Stigma" is a non-pecuniary social cost incurred by the criminal if caught and punished. See POSNER, *supra* note 49, at 226. For example, a shopping mall manager in Dallas, Texas claimed that when mall security guards caught youths engaging in crime, mall management would call parents rather than police, in part out of a desire to spare the youths from a criminal record. See Nora Lopez & Todd Bensman, *4 Security Guards Held in Beating of Youths at Mall; Nation of Islam Members Defended*, DALLAS MORNING NEWS, June 14, 1995, at 31A.

This is not to say that being on the receiving end of vigilante action would not carry its own stigma. Certain forms of vigilante action may cause the local community to notice and criticize the individual targeted by the vigilantes. Such local disapproval, however, is unlikely to create the lasting stigma of a public criminal record, which in addition to public embarrassment, may also result in legal exclusion from significant state benefits. For example, a state may disenfranchise a convicted felon even though the felon has successfully completed his prison sentence and probation. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (holding that state's refusal to allow convicted felons to register to vote is not a violation of the equal protection clause of the Fourteenth Amendment). Those subjected to vigilante punishment do not experience this type of *de jure* stigma. Of course, insofar as any stigma communicates useful information to those dealing with a former criminal, such a stigma may actually provide a social benefit which outweighs the disutility imposed on the ex-convict. See POSNER, *supra* note 49, at 226 ("Insofar as the stigma of conviction hurts merely because it conveys useful information to potential transactor with the convicted criminal . . . it creates social value that may offset the hurt.").

125. Lowering the cost of enforcement at all levels of sanction lowers the total social cost associated with the criminal justice industry. These reduced costs, in turn, shift the balance

Vigilante law enforcement, however, also creates social costs by undermining the stability and authority of the established criminal justice system.<sup>126</sup> Moreover, public law enforcement benefits from economies of scale and from the specialization of labor.<sup>127</sup> The effective public monopoly on law enforcement also mitigates problems resulting from the uneconomical duplication of enforcement efforts<sup>128</sup> and from free riders.<sup>129</sup> Furthermore, vigilante action may result in criminal penalties<sup>130</sup>—a cost to both the individual vigilante, who experiences the disutility of fines, imprisonment and stigma, and to society, which must bear the cost of imposing these penalties.<sup>131</sup>

On the whole, the effect of public and private enforcement of these respective impacts is indeterminate at best. They likely cancel each other out to a great extent, modifying the earlier analysis little. Although these cost factors may actually favor public enforcement,<sup>132</sup> the discrete and pervasive nature of taxes and the visibility of the public law enforcement infrastructure may distort the public's perception. In any case, the cost differential between public and private enforcement is insufficient to provide motivation to initiate vigilante activity without additional provocation.

## 2. *The absence of established law enforcement*

A scenario in which established law enforcement does not exist presents the easiest case for understanding the rationale underlying

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between enforcement, sanction, and crime. Because crime would then be more expensive relative to enforcement, the optimal level of crime would decrease. See *supra* Part IIA.2 (noting that under a "rational maximizer" model, an actor will not undertake any activity where the cost of the activity outweighs its benefits).

126. See WALTER V. CLARK, *THE OX-BOW INCIDENT* 47 (1960), *quoted in* Burrows, *supra* note 10, at 11 (recognizing dangers to political stability caused by formation of private armies); Posner, *supra* note 59, at 1204 (noting also the threat that private armies pose to political stability). This social instability all too often causes the vigilante action to degenerate into private wars between vigilante factions seeking to bring each other to "justice." See generally BURROWS, *supra* note 10, at 68-93 (relating the East Texas regulator/moderator skirmishes of the early 1840s).

127. See Landes & Posner, *supra* note 63, at 29-30 (noting that economies of scale exists in certain parts of law enforcement, most notably in the "investigative phase").

128. See *id.* at 19-20.

129. See *id.* at 29-30 (discussing potential economies of scale and free-rider problems under private enforcement versus public enforcement). In the case of vigilantism, the free rider problem is particularly pronounced, because the vigilante risks possible criminal sanctions, while the entire law abiding community benefits from the reduction in crime brought about by the vigilante's actions.

130. See *supra* Part I.C (discussing past and present punishment of vigilantes). Of course, if the vigilantes' actions were in response to the lack of an established public law enforcement system, this cost would be negligible. In that situation the vigilante would be no more likely than any other "criminal" to incur the public's wrath from his actions.

131. See *supra* note 62 (discussing the disutility of fines, imprisonment, and stigma for vigilantes and mentioning the expense of administering penalties).

132. The costs of social instability and potential criminal penalties, in particular, may favor public enforcement.

social justification and acceptance of extra-judicial self-help. When an established governmental system for enforcing the criminal law<sup>133</sup> does not exist, the only means available to protect Becarria's "repository of the public well being" is private action. Classical vigilantism on the American frontier epitomizes such private action.<sup>134</sup>

In the absence of an established law enforcement system, the social wealth explanation for vigilantism is straight forward. Under these circumstances, nothing but the threat of harm from the victim provides incentives for individuals to forego crime.<sup>135</sup> If the potential criminal is significantly stronger or more brutal than the potential victim, deterrence is ineffective. Under the model discussed in this Article, the probability that the criminal will incur a criminal sanction is now zero. Therefore, no matter how high the actual sanction, the expected cost of criminal activity is also zero. Individuals will commit any act providing a net personal benefit.<sup>136</sup>

But once the expected costs of crime to "honest" (i.e., law abiding) society begin to outweigh the costs associated with vigilantism, victims gain an incentive to band together and administer self-help criminal justice. This "vigilante justice" fills the law enforcement void.<sup>137</sup> Before the vigilante action, the probability of incurring sanctions for criminal activity was negligible. With the vigilance committee on patrol, this probability increases dramatically.<sup>138</sup> By reintroducing the possibility of apprehension and punishment, the vigilante enforcer provides significant levels of deterrence to society's criminal element.<sup>139</sup>

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133. Ignoring the Positivist/Pre-Positivist debate mentioned earlier, assume law may exist in the absence of an established administrative system.

134. See BURROWS, *supra* note 10, at 145-59 (describing how a lack of efficient and honest law enforcement officials drove individuals to band together in vigilante committees). Professor Burrows provides an excellent example in his discussion of the vigilante committees active during the early 1860s in what would become Montana and Idaho. *See id.*

135. Professor Posner notes that in the absence of an established criminal justice system, as in primitive societies, the threat of retribution from the victim's kinship group may provide deterrence. *See* POSNER, *supra* note 43, at 208-09. The threat posed by the victims of crime stems more from a desire to redress a personal wrong, than from a desire to redress a greater wrong to society.

136. This does not mean, however, that everyone will commit crimes. If an individual could obtain greater personal benefits with fewer personal costs by engaging in "honest" activities, he will continue to do so.

137. But because this form of vigilantism is really a reactive attempt to deal with existing crime, rather than a proactive attempt at prevention, it does not truly punish so much as it exacts collective retribution. *Cf.* POSNER, *supra* note 43, at 203-04 (comparing primitive systems utilizing retribution with modern systems punishing under authority of the sovereign).

138. It is at this point that the over-enforcement from the private "justice" suppliers, as discussed above, becomes an issue. *See infra* Part III.B.2.b (discussing the possibility that vigilantes may over-punish).

139. The deterrence provided by the classical frontier vigilante only partially resulted from his raising the probability of enforcement. Frontier vigilance committees were notorious for

### 3. *Exogenous changes in the costs and benefits of crime*

*Ceteris paribus*—all else held equal—is one of the most basic tools of economic analysis. The presumption that the costs and benefits of crime are static underlies the model set out in Part II. But what occurs if this presumption is relaxed, allowing time and change to enter into the calculus? Could the changes resulting from the introduction of these variables provide the stimulus for vigilantism?

#### a. *Exogenous increases in the damage from criminal conduct*

Not all criminals are created equal, and not all crimes are equally damaging to society. What if, for some reason, criminals shifted their unlawful activities toward crimes which caused greater social harm?<sup>140</sup> Could this shift provide the impetus for vigilantism?

Under the model explored in this Article, an exogenous increase in the social cost (i.e., harm) associated with crime should lead to an increase in the overall level of law enforcement.<sup>141</sup> After such an increase in social cost or harm, crime becomes more costly relative to law enforcement at all levels of law enforcement. Because society would experience a net benefit from the decrease in crime brought about by an increase in law enforcement, social consumption should shift in favor of law enforcement.<sup>142</sup>

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favoring capital punishment over other forms. See, e.g., BURROWS, *supra* note 10, at 152 (describing how a committee of vigilantes in the mid-1860s refused to heed pleas for leniency and hung their two victims).

Thus, the potential sanctions were extremely high. This supports the model's prediction that over-enforcement may be the result of private enforcement. See *supra* Part II.B.1 (discussing Landes & Posner's idea that private enforcers must over-enforce to cover costs); *infra* Part III.B.2.b (examining the potential for over-punishment by vigilantes).

140. Take the emergence of "crack" cocaine for example. During the mid-1980s, a marked increase in homicide and other violent crimes associated with drug dealing accompanied this shift from dealing cocaine powder to cocaine crystal. *Slaughter in the Streets; Crack Touches Off a Homicide Epidemic*, TIME, Dec. 5, 1988, at 32 [hereinafter *Slaughter*]. This increased propensity for violence, given the same underlying crime (dealing in illicit cocaine), is exactly the kind of exogenous change in social harm to which this Article refers.

141. This change in the harm from crime would appear graphically as a left-ward shift in the social loss indifference curve. See fig. 2, *infra* Appendix. The social loss indifference curve relates the various combinations of sanction and probability of sanction yielding a constant social loss given a level of harm from crime. See Landes & Posner, *supra* note 63, at 12 (detailing the social loss indifference curves).

142. See *supra* note 64 and accompanying text (explaining how the criminal justice system balances net harm from crime, the cost of the sanction and enforcement expenses when determining what level of criminal activity to permit in society). Returning to the example of a shift in the type of cocaine sold, the criminal justice system's harsher treatment of crack dealers relative to powder dealers has lead to charges of institutional racism. See, e.g., 141 CONG. REC. H10,255, 10,258 (daily ed. Oct. 18, 1995) (statement of Rep. Jackson-Lee) (explaining that "cruel sentencing structure" forces courts to make unfair decisions that punish certain races of people more extremely than others). This debate could gain immensely from the foregoing analysis. If the observed disparities are in fact justified by differences in social harm, the argu-



Although total social costs will rise due to the greater damage from crime, an increase in law enforcement minimizes the overall increase in social harm. By lowering the crime rate, additional law enforcement generates a social gain by off-setting the higher relative social costs of law enforcement with the lower relative social costs of crime.<sup>143</sup>

But problems arise when these changes unfold in the actual criminal justice system. As stated in Part II,<sup>144</sup> the output restrictions caused by legislative under-funding allow actual public law enforcement to mirror the theoretical optimal level of law enforcement given constant social costs from crime.<sup>145</sup> When we allow the social costs of crime to vary, this systematic control becomes problematic.

The time lag inherent in governmental administration effectively freezes funding levels.<sup>146</sup> As a result, the output of criminal justice remains static, despite the benefits available to society from an increase in production. But even if the legislature approves funding to increase enforcement, the lag persists because of the need to train additional police and build additional infrastructure.<sup>147</sup> These governmental restrictions on the supply of criminal justice force society to consume more of the substitute good (i.e., permit more crime to take place) than it would in an unfettered market.

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ment against different sentencing schemes collapses. See generally Kelly D. Hine, *The Commissioners' New Clothes* (1997) (unpublished manuscript, on file with *The American University Law Review*) (arguing that increased social costs associated with "crack" justify higher sentences relative to powder cocaine).

143. Posner arrives at a similar conclusion, albeit using a different route. For Posner, an exogenous change in the social costs of crime would cause an upward shift in the law enforcement demand curve. See POSNER, *supra* note 49, at 596-97. This analysis would be accurate given an exact correlation between the harm suffered by society and the benefit derived by the criminal from his actions. See *infra* Part III.A.3.b. But in fact, the social harm caused by crime is often not in proportion to the benefit the criminal enjoys. See Shavell, *supra* note 58, at 1234-35 (noting that if the expected social benefits from an act are positive, the desirability of the act depends on the expected harm). For example, the social damage resulting from the rape/murder scenario mentioned above would be tremendous. See *supra* note 70 (suggesting that if both rape and murder are capital crimes, the rapist has no incentive not to murder his victim and eliminate a witness); see also POSNER, *supra* note 49, at 196-201 (discussing the problem of valuing human life). On the other extreme is the chemotherapy patient who uses marijuana to increase his appetite. The personal benefit this criminal derives is enormous relative to the (arguably) minimal social harm caused by his actions.

144. See *supra* Part II.B.3.

145. See *supra* note 100 and accompanying text.

146. This lag period can be very short or very long depending on the salience of the issue. In the case of crack cocaine, an ironic criticism is that the government reacted too swiftly and strongly in addressing the problem. See Jill Smolowe, *One Drug, Two Sentences*, TIME, June 19, 1995, at 44.

147. As Posner notes, increasing the likelihood of apprehending and convicting criminals is notoriously expensive. See Posner, *supra* note 59, at 1205 n.25 (explaining that increasing apprehension and conviction would require more investments and how this cost may explain why the crime rate is high). In budget weary times, increased funding to expand the public enforcement system may not be available, even if needed and politically expedient.

As in any instance where artificial controls limit the availability of a desired good, the "price" of that good rises.<sup>148</sup> This higher price means greater benefits for those willing to circumvent the established system. If these benefits become sufficiently large, individuals may begin to engage in "black market" behavior—here vigilantism—to supply the pent up demand.<sup>149</sup>

As a result, an exogenous change in the social harm associated with crime could provide the spark to ignite vigilante activity. The time lag involved in funding and implementing additional public enforcement may create gross inequities between the demand for criminal justice and its supply: The output restrictions favoring public enforcement, in theory, may result in under-enforcement in fact. The resulting benefits available to society from bridging that gap provide incentives for individuals to forego the established system and engage in vigilantism. If the inequity is severe enough and the available benefits great enough to overcome the vigilantes' expected costs, vigilante activities will occur.<sup>150</sup>

*b. Exogenous increases in the personal costs and benefits from crime*

What if for some reason, criminal activity suddenly became more profitable relative to "honest" occupations? Examples of this type of situation include a recession which reduces the availability of "honest" work, or where the manufacture or importation of a new drug increases the money to be made from illegal drug dealing. How would the model respond to such an exogenous change in the personal costs and benefits associated with crime? Would this reaction

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148. The concept of "price" may encompass more than the mere pecuniary reward received by a supplier in exchange for delivery of a good. "Price" in the broader sense encompasses the total benefit—including non-pecuniary rewards—received in exchange for the good. "Price," in this instance, denotes the non-pecuniary social benefit received from an increase in law enforcement.

149. See CHRISTOPHER PASS ET AL., THE HARPER COLLINS DICTIONARY OF ECONOMICS 46 (Eugene Ehrlick ed., 1991). Pass defines "black market" as an:

unofficial market that may arise when a government keeps the price of a product below its equilibrium rate, that is, the price at which quantity supplied equals quantity demanded, and is then forced to operate a rationing system to allocate the available supply among buyers. Given that some buyers are prepared to pay a higher price, some dealers will be tempted to divert supplies away from the official market by creating an under-the counter secondary market.

*Id.*

150. Professor Burrows relates the story of the Maccabees, a vigilante group composed of Hasidic Jews in the Crown Heights district of New York City. See BURROWS, *supra* note 10, at 256-58. In response to an increase in the frequency and severity of attacks occurring in the area, a local rabbi organized the group to patrol their neighborhood and apprehend criminals, despite the existence of a well established public criminal justice system. The Maccabees viewed their actions as augmenting a system spread too thin to provide sufficient protection. See *id.* at 257.

provide incentives for engaging in vigilante activity?

Deterrence is a function of the costs and benefits associated with crime.<sup>151</sup> Because of this relationship, an exogenous change in either costs or benefits necessitates a modification of the deterrence scheme. Following the exogenous change, the probability of incurring a sanction and the level of severity of that sanction no longer provide the optimal level of deterrence. Society must impose new penalties or probabilities of enforcement to realign the criminal's expected costs and benefits.

In the case of an exogenous increase in the benefits of crime<sup>152</sup> or an exogenous decrease in the opportunity costs of crime,<sup>153</sup> the optimal combination of sanction and probability of incurring a sanction increases.<sup>154</sup> This increase occurs because the expected personal benefit a criminal receives from her criminal activity is now greater relative to her expected personal cost. To reestablish deterrence, society must increase the overall level of law enforcement.

But as stated earlier, law enforcement does not come free of social costs. The necessary increases in the sanction and probability of sanction now make law enforcement more expensive relative to crime.<sup>155</sup> Because law enforcement becomes relatively more expensive, society minimizes its total costs by limiting consumption of law enforcement and allowing an increase in the overall crime rate.<sup>156</sup> These changes result in an overall increase in both law enforcement and crime.<sup>157</sup>

The established public law enforcement system encounters problems under these facts similar to the problems discussed in reference to an exogenous increase in the harm from crime. The inherent funding and implementation lag may again result in under-

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151. See Posner, *supra* note 59, at 1195 (analyzing the purpose of criminal law in terms of economic efficiency); Shavell, *supra* note 58, at 1235 (discussing monetary and non-monetary sanctions and how they work as deterrents).

152. The higher profit margins available upon the introduction of crack cocaine, for example, would constitute an exogenous increase in the benefits of crime. See *Slaughter*, *supra* note 140, at 32.

153. A higher unemployment rate, for example, would constitute an exogenous decrease in the opportunity cost of crime. See POSNER, *supra* note 49, at 223 (discussing how crime could be reduced by increasing the opportunity costs of a crime by reducing unemployment).

154. See Shavell, *supra* note 58, at 1245 (explaining that the optimal sanction rises with expected private benefits).

155. Stated graphically, the increase in law enforcement moves society up the social loss indifference curve. See fig. 2, *infra* Appendix.

156. Graphically, a shift to the left of the social loss indifference curve. See fig. 2, *infra* Appendix.

157. Graphically, an upward shift in the law enforcement demand curve. See fig. 1, *infra* Appendix.

enforcement.<sup>158</sup> This under-enforcement creates a gap between the demand and the available supply of criminal justice, which raises the price society is willing to pay for law enforcement. As discussed above, this gap may form the basis for a black-market in criminal justice—for a vigilante justice supply to fulfill the community's demand.

*B. Why Does the Law Prohibit Certain "Vigilante" Activities While Allowing Others?*

From the foregoing analysis, it appears that private extra-judicial self-help may arise as a logical, and indeed inevitable, community response to insufficient or non-existent public law enforcement. The government cannot, or will not perform the service, so the vigilante enforcer augments or replaces the public enforcer. Why, then, would the established criminal justice system punish the vigilante for addressing the system's own deficiencies?

*1. Protection of governmental interests*

One explanation might be that penalizing vigilantism is merely the established criminal justice system's way of protecting its effective monopoly in law enforcement. The criminal sanctions faced by vigilantes pose a barrier to entering the criminal justice market. By establishing barriers to entry, the public criminal justice system minimizes competition. Without competition from private criminal justice suppliers, the established system may continue to exact monopoly rents—when the sheriff is the only law in town, the sheriff is an important individual.

Among conspiracy theorists and anti-governmentalists, this argument might garner considerable support. After further analysis, however, this explanation falls short of the mark. It fails because our democracy blurs the line between government and the governed—a system of, by and for the people should have limited incentives to exploit people. In short, the political accountability intrinsic in American government makes it more likely that these barriers are merely circumstantial by-products of punishing vigilante activity, rather than the underlying motivation for such punishment.<sup>159</sup>

*2. Violence and social cost*

The better answer to why the established criminal justice system punishes vigilantes in spite of their efforts to address the system's own

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158. *But see supra* note 146 (citing rare example of short lag and rapid implementation).

159. Perhaps this is naive supposition, but a thorough analysis of the effect of public accountability on the criminal justice system is beyond the scope of this Article.

deficiencies lies in the vigilante's noted disposition toward violence.<sup>160</sup> Commentators invariably cite violence as a reason for deploring vigilante activity.<sup>161</sup> As stated earlier, the use of violent force to exact punishment and encourage compliance with the law is not *per se* objectionable to society.<sup>162</sup> Yet, the established criminal justice system sides with the detractors on this issue by drawing a bright line against violent vigilantism.

So what makes violent vigilante law enforcement more objectionable than violent law enforcement by the state? More directly, why punish a vigilante for committing acts that are justified when performed under the color of law? The ultimate answer to these questions most likely centers around the vigilante's unchecked use of excessive, and often deadly, force.

*a. Imminence and perception*

The foregoing social wealth maximization analysis was premised on the assumption that society is able to gauge accurately the costs and benefits associated with crime. This assumption necessarily underlies the delicate balancing of criminal activity and the corresponding sanction found in the model. But when and to what degree the use of force is justified in coercing legal compliance has been the subject of jurisprudential debate for ages.<sup>163</sup> One thing that is clear from this debate is that line drawing is a divisive and highly personal activity. As in defining vigilantism, when asked whether state intrusion is justified, nine different people will provide ten different answers.<sup>164</sup> Perhaps because of this divisiveness, our system generally entrusts the legislature—society's collective conscience—with the power to determine which actions to criminalize, how severely to punish them, and at what level to set enforcement. Because compromise lies at the heart of the democratic lawmaking process, extremism is often held in check.

But absent state intervention, the vigilante faces no similar restric-

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160. See BURROWS, *supra* note 10, at xiii (tracing the source of vigilante power to the vigilantes' violent tendencies).

161. See, e.g., Editorial, *Justice?*, DALLAS MORNING NEWS, June 22, 1995, at 20A (arguing against countenancing the mall guard vigilantism because of concern for increased violence).

162. See, e.g., *supra* notes 6-9 and accompanying text (discussing how individuals accept the use of violence to protect themselves, their property, and others).

163. Compare JOHN S. MILL, ON LIBERTY (1859) (arguing for minimal governmental interference), with GERALD DWORKIN, MORALITY, HARM AND THE LAW (1994) (advocating extensive governmental paternalism).

164. See, for example, the five separate opinions issued in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), discussing conflicting views of permissible state intrusion and the right to privacy.

tion. In fact, the imminence of the harm and the exigency of the circumstances surrounding vigilante action promote extremism. Because the crime affects his business, his family, his community, the potential vigilante may overestimate the costs of crime to society as a whole.<sup>165</sup> In the eyes of the victimized citizen, this misperception would justify a higher degree of law enforcement relative to crime. In the terms of the model, the vigilante consumption shifts in favor of law enforcement because crime is perceived as more expensive. This shift actually lowers total social wealth, due to the vigilante's access to imperfect information.

To prevent (or at least dissuade) citizens from acting in accordance with these extremist pressures, the established justice system imposes criminal sanctions on vigilante activities.<sup>166</sup> These sanctions raise the expected personal cost of vigilantism; and, as with any other "criminal" actor, if the expected penalty for engaging in vigilante activity outweighs the benefits of acting in that regard, vigilantism will not occur. The threat of incurring a criminal penalty checks the unwarranted resort to extra-judicial self-help. In this way, society's failure to decriminalize vigilantism provides a means to prevent citizens' perceptions of the system's shortcomings from causing additional social harm.

*b. The hangman's noose: excessive violence and vigilantism*

Preventing additional social harm caused by citizens who perceive a deficiency in the system's law enforcement cannot be the only reason for failing to decriminalize vigilantism. If it were, participation in any form of vigilante activity would subject a citizen to the risk of punishment. The need to prevent overzealous law enforcement would necessitate penalties even for the non-violent vigilantism our system applauds.

So, if the problem isn't violence *per se* and if the problem isn't vigilantism *per se*, there must be something peculiar about the vigilante's use of violence that warrants social reprobation. What about vigilante violence makes it more reprehensible than state violence? Placing aside the philosophical arguments concerning the right to punish, social wealth analysis points to the severity of the punishment

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165. In the mall guard case, for example, one community leader opined, "[e]veryone knows . . . that all of our children—black, white, brown, red, yellow—are out of control." John Yearwood, *5th Arrest Made in Beatings; Nation of Islam's Local Leader Charged*, DALLAS MORNING NEWS, June 22, 1995, at 23A (statement of Robert Muhammad, head of the Nation of Islam's Southwest region). While juvenile crime has increased significantly, stereotyping an entire generation as out of control seems an extreme response to a single shoplifting incident.

166. Or, more accurately, it fails to make allowance for justified vigilantism.

often meted out by vigilantes as the answer.

As discussed above, the immediacy of the harm from crime can distort a victim's perception of the impact of crime on the greater society.<sup>167</sup> These same forces may also alter a victim's perception of the effectiveness of the established criminal justice system.<sup>168</sup> Because deterrence is a function of both the sanction for criminal behavior and the probability of incurring that sanction,<sup>169</sup> this second distortion may help explain the excessive violence endemic to the vigilante *qua* vigilante.

The vigilante's proclivity for violence runs deeper than a simple misperception. The vigilante believes (correctly or incorrectly) that a reduction in crime will increase social welfare.<sup>170</sup> To deter crime, the vigilante must either increase the likelihood of apprehending and convicting criminals or increase the sanction for criminal activity. The tool of choice depends on the vigilante's view of the established legal system's ability to handle criminals once apprehended. If the vigilante believes the established system competently handles criminals once caught, she will prefer an increase in the probability of apprehension over an increase in the sanction for crime.<sup>171</sup> But if the vigilante views the established system as unable to administer properly criminal justice, the vigilante will prefer higher sanctions.

The second scenario, involving the proper<sup>172</sup> or misguided<sup>173</sup> distrust of the establishment, is by far the more common in the history of American vigilantism. In the terms of the model, the vigilante who distrusts the establishment would view the probability of inflicting

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167. See *supra* note 165.

168. Following the grand jury's failure to indict in the mall guard case, one community member (a county commissioner) said of the guards, "These gentlemen did more than any criminal justice system could have possibly done." Scott & Bensman, *supra* note 3, at 12A.

169. See *supra* Part II.A.2.

170. The vigilante will not act unless he stands to benefit from the action. He will not benefit from vigilantism unless additional law enforcement is preferred to crime. Additional law enforcement will not be preferred to crime unless the vigilante believes a reduction in crime will increase social welfare. See *id.*

171. This is because the vigilante may remove herself after completing the first step of the process. The established system bears the actual and opportunity costs associated with punishment, and the vigilante may return to her normal activities. Neighborhood Watches and the Maccabees would both fall under this category. See *supra* note 150 (relating story of group of Hasidic Jews organized to patrol their neighborhood).

172. See, for example, Professor Burrows' description of the "trial" of Charles W. Jackson, *supra* note 10, at 68-69 (describing how a judge in 1841 allowed the criminal to go free, despite the numerous eye witnesses who had seen him shoot his victim, because of threatening and intimidating tactics used by the criminal and his supporters).

173. Community residents interviewed in the mall guard case repeatedly voiced their mistrust of the establishment. See, e.g., John Yearwood & Audrey S. Lundy, *Oak Cliff Debates Beatings of Young Theft Suspects*, DALLAS MORNING NEWS, June 25, 1995, at 29A (quoting residents in the community about their belief that the members of the community must take care of their own children).

criminal sanctions as minimal because the system is ineffective at ferreting out and punishing criminals. Raising the apprehension rate, merely to have the established system fail to punish the wrongdoer, would waste the vigilante's resources. Moreover, the opportunity costs of abandoning his normal work in favor of hunting down outlaws keep the citizen from undertaking law enforcement on a regular basis.

To compensate for this low probability of apprehension, the vigilante increases the actual punishment dealt—the less capable the vigilante believes the established system, the more brutal the punishment.<sup>174</sup> Because the vigilante, by definition, will not act unless he perceives significant shortcomings in the established system,<sup>175</sup> the vigilante enforcer invariably metes out punishment in excess of that normally considered appropriate.<sup>176</sup>

Social concern for this inherent tendency to over-punish best explains the current state of the law of extra-judicial self-help. At very low levels of sanction, social concern for punishment is minimal. But as penalties increase, concerns for the disutility caused by sanctions and for the effect of sanctions on marginal deterrence assume a greater import.<sup>177</sup> Because non-violent vigilantism causes minimal social harm, society need not expressly criminalize it. Society's failure to decriminalize violent vigilantism, however, provides a check on the vigilante's systematic over-punishment. Because of the lack of a "justified vigilantism" defense, the potential for criminal sanction provides incentives for the vigilante to minimize harm or to forego violence altogether.

### CONCLUSION

After viewing the history, and the causes, as well as the pros and cons, does the current position of the established criminal justice system make sense? The social animosity that excessive violence raises undoubtedly necessitates some check on vigilantism. A blanket prohibition against the vigilante's use of force, however, may not be the best solution.

Recognizing a "justified vigilantism" defense to criminal prosecution provides a viable alternative. Relieving an accused vigilante from

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174. See *supra* Part II.A.2 (arguing that the lower the probability of apprehension, the higher the actual punishment to yield an optimal expected punishment).

175. See *supra* Parts III.A.2-3 (discussing how absence of established law enforcement system and exogenous change in social harm associated with crime lead to vigilantism).

176. See, e.g., Yearwood & Lundy, *supra* note 173, at 29A (quoting a community member as stating that "I'm for a child getting whipped . . . but not like that.").

177. See *supra* Parts III.A.2-3.



criminal liability on a finding that his actions were reasonable under the circumstances would maximize social wealth.

If a vigilante's actions are in fact a rational response to a failure of the established criminal justice system, if the vigilante bases his actions on an accurate perception of social need, and if he keeps the imposed sanction within socially tolerable bounds, then the vigilante has provided a social "good." Punishing a citizen for providing a benefit to society is simply nonsensical. It lowers total social wealth by wasting scarce judicial resources and by creating perverse incentives to avoid socially beneficial behavior. Allowing a "justified vigilantism" defense would minimize these problems by minimizing information costs and maximizing total social welfare.

In closing, the truth is that Dick *can* shoot Henry for stealing Jane's truck. Dick can shoot him in self-defense, to defend Jane, to defend Jane's property, or under any circumstance that a jury thinks justified. Recognizing a "justified vigilantism" defense would legitimize the reasonableness determination which juries often implicitly make. It would allow juries to interpose openly their common sense judgment as to whether the actions of the accused were in fact beneficial to society. The Supreme Court of the United States has recognized such interposition as an essential element of the jury system: "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." <sup>178</sup> The hypocrisy of forcing juries to hide behind legal fictions, contorted facts, and walls of silence can only serve to lessen societal respect for the established criminal justice system. This being so, perhaps the established system should revisit its current position on extra-judicial self-help.

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178. *Williams v. Florida*, 399 U.S. 78, 100 (1970).

APPENDIX

Figure #1

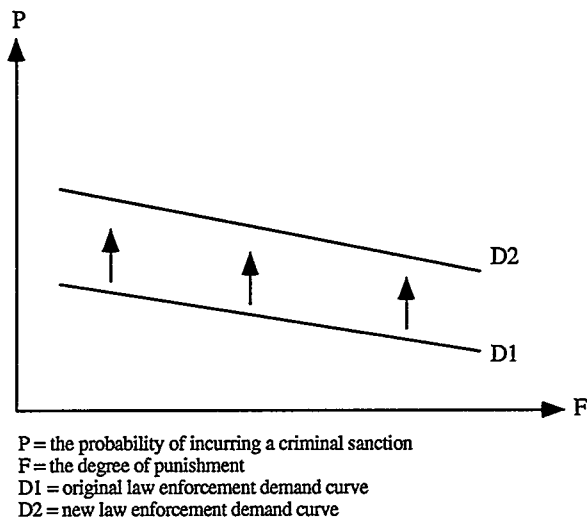


Figure #2

